In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, PLAINTIFF IN ERROR, v. A. SCHRADER'S SON, (INC.). } No. 567.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, in accordance with the provisions of the Criminal Appeals Act, 34 Stat., 1246, moves the Court to advance the above-entitled cause for hearing on a day convenient to the Court, upon the ground that the case is one of public importance, both in itself and because it will control the decision of numerous other cases.

Defendant was indicted under the Sherman Act in the Eastern Division of the Northern District of Ohio, upon a charge of engaging in a resale price-fixing combination with dealers in its products throughout the United States.

The District Court sustained a demurrer, stating:

> I interpret it [the indictment] as charging that the defendant has made contracts with

> all tire manufacturers and jobbers to whom it sells it product * * * requiring that they shall not sell to jobbers and vehicle manufacturers, retail dealers and the consuming public except at certain prices fixed by the defendant.

It declared that—

> The Dr. Miles Medical Company case standing alone would seem to require that this demurrer be overruled.

But it referred to the decision of this Court in *United States* v. *Colgate & Co.* (decided June 2, 1919) and thereupon concluded that—

> The decision in the Dr. Miles Medical case must rest upon some other ground than the mere fact that there were [price-fixing] agreements between the manufacturer and the wholesalers.

It held that the necessary effect of this Court's decision in the *Colgate* case (despite the express words of the Court) was that the Sherman Act does not condemn resale price-fixing contracts between a manufacturer and dealers in its products which obligate the dealers not to resell the manufacturer's products except at prices fixed by it.

Notice of this motion has been served upon opposing counsel.

Alex C. King,
Solicitor General.

October, 1919.

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IN THE

Supreme Court of the United States

October Term, 1919

NO. 567

THE UNITED STATES OF AMERICA
Plaintiff-in-Error

v.

A. SCHRADER'S SON (INC.)
Defendant-in-Error

In Error to the United States District Court of the United States for the Northern District of Ohio

BRIEF FOR A. SCHRADER'S SON (INC.) DEFENDANT-IN-ERROR

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APPEAL PRINTING COMPANY, New York.

CONTENTS.

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 567.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,

against

A. SCHRADER'S SON, INC.,
Defendant-in-Error.

In Error to the United States District Court for the Northern District of Ohio, Eastern Division.

BRIEF FOR A. SCHRADER'S SON, INC., DEFENDANT-IN-ERROR.

Statement.

This case comes before this Court upon a writ of error sued out by the United States under the Criminal Appeals Act of March 2d, 1907, 34 Stat., 1246 c. 2564, to review the judgment herein of the United States District Court for the Northern District of Ohio—Eastern Division—sustaining defendant's demurrer to an indictment for an alleged violation of the Act of July 2d, 1890, 26 Stat., 209 c. 647, commonly known as the Sherman Anti-Trust Act.

The indictment, consisting of one count, was filed in the court below on June 19th, 1918 (Rec., p. 1).

From the indictment it appears among other things that A. Schrader's Son, Inc., a New York corporation, is a manufacturer of patented valves and valve parts, pneumatic pressure gauges and various other accessories for use in connection with pneumatic tires on automobiles and other vehicles, and sells and ships large quantities of these articles to tire manufacturers and to jobbers throughout the United States, who, in turn, sell and ship to others (Rec., p. 1 *et seq.*).

The indictment does not charge that the defendant has a monopoly of the trade in the above mentioned articles, nor is it charged that the defendant is acting in concert with any other manufacturer of similar articles. The indictment does not charge any agreement between defendant and retail dealers in defendant's goods. The indictment attempts to charge a combination between the defendant and certain of its own customers, viz., tire makers and jobbers, and annexed thereto are certain License Agreements, which the defendant has entered into with said tire makers and jobbers. None of the tire makers or jobbers, with whom it is charged that the defendant engaged in the alleged combination, were made defendants or named in the indictment, nor is it averred that their names were to the grand jurors unknown.

The indictment being short is here set forth in full (with the exception of the license agreements), and is as follows:

> "The grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire in and for the Northern District of Ohio, and so in-

quiring, upon their oaths, do find and present as follows:

"A. Schrader's Son, Inc. (the defendant), is a corporation under the laws of the State of New York. Its principal offices and factory are at Brooklyn, New York. It is there engaged in manufacturing, under Letters Patent of the United States, the following products, namely, valves and valve parts, pneumatic pressure gauges, and various other accessories, all for use in connection with pneumatic tires on automobiles and other vehicles. It regularly sells and ships large quantities of such products to tire manufacturers and to jobbers in the Northern District of Ohio, and throughout the United States. These tire manufacturers and jobbers resell and reship large quantities of these products to (a) jobbers and vehicle manufacturers, (b) retail dealers, and (c) the consuming public, both within and without the respective States into which the products are shipped, as aforesaid by the defendant. The above described sales and resales, shipments and reshipments of the products of the defendant constitute trade and commerce among the several States of the United States.

"Within the three years immediately preceding this indictment in the said Northern District of Ohio and throughout the United States, the defendant knowingly and unlawfully engaged, in the manner hereinafter described, in a combination with the said tire manufacturers and jobbers to whom it sold and shipped its products, in restraint of the above described trade and commerce among the several States in such products, in violation of the Act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies'; that is to say:

"The defendant executed, and caused all the said tire manufacturers and jobbers to whom it sold its

said products to execute with it, uniform contracts concerning resales of such products. Each such manufacturer and jobber was informed by defendant, and well knew when executing such contracts that identical contracts were executed and adhered to by the other manufacturers and jobbers. The contracts purported to contain a grant of a 'license' from the defendant to resell its said products at prices fixed by it to (a) jobbers and vehicle manufacturers similarly 'licensed,' (b) retail dealers, and (c) the consuming public. The contracts provided that the products should not be resold at prices other than those fixed by defendant. The provisions of the contracts were as set forth in Exhibits A, B, C, and D, respectively, hereto annexed. The names of the contracting tire manufacturers were inserted as indicated in Exhibits A and B. The names of the contracting jobbers were inserted as indicated in Exhibits C and D.

"In connection with the aforesaid contracts the defendant furnished to the tire manufacturers and jobbers who entered into such contracts lists, as shown in Exhibits A, B, C, and D, of uniform prices which it fixed for resales of its said products to (a) jobbers and vehicle manufacturers, (b) retail dealers, and (c) the consuming public, respectively.

"The defendant uniformly refused to sell and ship its products to tire manufacturers and jobbers who did not enter into such contracts and adhere to the uniform resale prices fixed and listed by defendant as aforesaid.

"By reason of the foregoing, tire manufacturers and jobbers in the Northern District of Ohio and throughout the United States uniformly resold the defendant's products at uniform prices fixed by the defendant and uniformly refused to resell such products at lower prices. Thus competition amongst the said tire manufacturers and jobbers in the resale of such products in the above described com-

merce among the States was suppressed and the prices of such products to the retail dealers and to the consuming public in the Northern District of Ohio and throughout the United States were maintained and enhanced.

"And so the grand jurors, upon their oaths, do say that A. Schrader's Son (Inc.), within the period of three years immediately preceding the return of this indictment, in the Northern District of Ohio, in the manner aforesaid, unlawfully engaged in a combination in restraint of trade and commerce among the several States, against the peace and dignity of the United States and contrary to the statute in such case made and provided."

On or about the 1st day of July, 1918, the defendant filed a demurrer to this indictment on the ground that the allegations contained therein were insufficient to charge any offense by the defendant against the laws or statutes of the United States, and on the ground that the indictment did not state facts sufficient to constitue an offense. On the first argument of said demurrer the district Court overruled same and the defendant was ordered to go to trial. The case was thereupon placed upon the trial calendar and came on for hearing on or about the 15th day of September, 1919. Before the impaneling of a jury the District Court announced that it would like to again hear argument of the demurrer. Counsel then proceeded to reargue the demurrer and the District Court thereupon set aside its former ruling and proceeded to give its interpretation of the indictment and sustained the defendant's demurrer. It is from the judgment entered on the second decision of the District Court that the Government now prosecutes this writ of error (Rec., pp. 29, *et seq.*).

Summary of Points.

On this appeal the defendant-in-error makes the following points:

1. The indictment is not sufficient in form or substance to charge the defendant with an offense.

2. The conduct here involved does not constitute a combination in restraint of trade and commerce in violation of the Sherman Act, and in view of the District Court's interpretation of the indictment it is open to this Court to state the law governing the indictment.

ARGUMENT.

First.—The indictment is not sufficient in form or substance to charge the defendant with an offense.

The opinion of the District Court, rendered on sustaining the demurrer, covers several pages of the printed record and therefore, and *for the purposes of this first point only*, we will give only a summary of what the District Court held the indictment to charge (Rec., pp. 29, *et seq.*).

After repeating the allegations of the indictment, the District Court, interpreting it, said:

> "Thus it will be observed that the contract, combination, or conspiracy charged comes merely to this: That the defendant has agreed, combined or conspired with tire manufacturers and with jobbers by the selling or agreeing to sell valves, valve parts, pneumatic pressure gauges and various accessories, with the further understanding or agreement that in making resales thereof, they will sell only at certain fixed prices. It will be further observed that the retailers, to whom the jobbers in ordinary

course of trade would naturally sell, rather than to the consuming public, and who in turn sell and distribute these articles to and among the ultimate consumers, are not included within the alleged combination or conspiracy. True, if a tire manufacturer or licensed jobber makes a sale to a consumer it is charged that he has agreed to sell only at the listed prices, but so far as retailers themselves are concerned, they may sell or give away the articles thus bought without violating any agreement, understanding or condition of the alleged combination or conspiracy in restraint of trade."

* * * * *

"The Government asserts that agreements between a manufacturer and jobbers for the sale to them of the manufacturer's own product on condition or with the understanding on their part that they will resell that product only at certain prices fixed or listed by the manufacturer, is *per se* a contract or combination or conspiracy in restraint of trade in violation of the provisions of the Sherman Anti-Trust Act.

"It is further asserted that this is true regardless of whether or not the prices thus fixed are reasonable, whether or not the arrangement is one made only to prevent ruinous competition tending to paralyze production, and whether or not, except as is implied by the agreements themselves any monopolization or unreasonable restraint of interstate trade is thereby produced; in other words, a case is stated and is proved merely by proving an agreement between the manufacturer and jobbers who resell and distribute his product whereby the latter agree to sell at prices fixed by the former. And it is asserted that Section 1 of the Sherman Anti-Trust Law properly construed, forbids any such arrangement. Manifestly if this construction is given said section the crime is committed if the manufacturer makes these agreements with two or more of his jobbers;

and, if upon the trial proof is produced that defend-
ant has made such contracts with two or more and
with stronger reason when proof is produced that
he has made such contracts with all or substantially
all of his jobbers, then the Court must charge the
jury as a proposition of law that the defendant is
guilty and refuse to permit the introduction of tes-
timony to show that monopoly has not resulted, that
trade has not been restrained, or that the tire manu-
facturers and jobbers sell little or no part of the
product to the customers. * * * the retailers
are not in the present case included. They may com-
pete freely with one another and may even give
away the articles purchased by them. No restric-
tion is imposed which prevents them from selling
to the consumer at any price even though it be a
ruinous sacrifice and less than the price made to
them by the jobber. * * * There must be a pur-
pose to create and maintain a monopoly, and the
acts charged in the indictment must be sufficient to
show that there was effective means adopted to cre-
ate and maintain a monopoly, otherwise the right
of the trader or manufacturer to specify resale
prices and refuse to deal with anyone who fails to
maintain the same is of necessity destroyed. * * *

"The point, however, which I wish to emphasize
is that the allegations of this indictment, not alleg-
ing any purpose, or facts from which such a pur-
pose can be inferred to monopolize interstate trade
within the prohibition and meaning of Section 2 of
the Sherman Anti-Trust Act and the last clause of
Section 2 of the Clayton Act, does not charge a
crime under Section 1 of the Sherman Anti-Trust
Act as that act should be construed; * * * I in-
terpret it as charging that defendant has made con-
tracts with all tire manufacturers and jobbers to
whom it sells its product, to execute uniform con-
tracts, and that these contracts contain provisions
requiring that they shall not sell to jobbers and

> vehicle manufacturers, retail dealers and the consuming public, except at certain prices fixed by the defendant. The Sherman Anti-Trust Law, as I construe it, in absence of other and additional allegations charging an intent and purpose to monopolize trade, does not make the acts thus charged a crime, and this conclusion is the same despite the fact that defendant contends this product is covered by patents which permit it to control the resale prices in the manner set forth in the agreements exhibited with the indictment."

What the District Court means is plain, i. e. that the indictment fails to charge that the defendant controls any definite or large percentage of the trade in which it is engaged; that there is nothing in the indictment to show how far-reaching defendant's contracts may be, or that they are unreasonable under the circumstances, or that defendants are controlling or dominant factors in the trade; that price fixing is not illegal *per se;* that there is no averment in the indictment that those who purchase from the defendant are not at liberty to purchase from other manufacturers, or that defendant's agreements unduly affect the trade; that for aught that appears from the indictment, there are many manufacturers of valves, valve parts, pneumatic gauges, and accessories; that retailers are not restricted at all in their dealings with the consuming public, and may sell the defendant's goods for any price they see fit, however small; in other words, that there is no allegation of fact in the indictment from which the Court can determine that the alleged combination is unreasonable or that "the rule of reason" is infringed, or that it does not promote competition, or that the alleged restraint is not entirely lawful.

It is the rule that on appeals under the Criminal Appeals

Act this Court must accept the District Court's interpretation of the indictment and confine its review to the question of the construction of the statute involved in the District Court's decision.

United States *v.* Colgate & Company, 250 U. S., p. 300-302, and cases there cited.

Applying this rule, we submit that the indictment fails to charge facts sufficient to make out a crime for the reason that the Sherman Act, the statute involved, when properly construed, requires that an indictment allege facts which, when admitted by demurrer, are sufficient to constitute a crime; in this case the crime of combination—unreasonable combination.

Under the District Court's interpretation of the indictment, the fundamental allegations which would be necessary to sustain even a civil suit are lacking.

Board of Trade *v.* United States, 246 U. S., 231.

The defendant does not, however, have to rely on any analogy that there may be between a criminal and a civil suit for the reason that there is a well considered decision in a criminal suit which is exactly in point.

In the United States *v.* Whiting, 212 Fed. Rep., 466 (1914), the Court had under consideration an indictment in reference to a restraint of trade in milk and the Court there said, p. 479::

> "This indictment charges a conspiracy in restraint of trade. It does not contain the allegations of indictment No. 454 as to the percentage of milk sold in the country districts for shipment to the Boston and Worcester markets, which was bought by the defendants, nor any allegations from which it can be inferred that the defendants either controlled or

were dominating factors in the buying market in the country or selling markets in those cities. For aught that appears, they may have been unimportant factors in each one. This indictment would have been good if no question of reasonableness were open. * * * But under the Sherman Act that question is open, and the indictment must, as above explained, allege facts warranting a finding by the jury that the restraint was unreasonable. The facts alleged do not justify such a conclusion, and no crime is therefore charged. Everything which this indictment sets out may be true, and still the combination or conspiracy may not have extended beyond what was reasonable, nor have unduly affected the conditions under which other persons engaged in that industry, either buying or selling, did business.

"In State *v.* Eastern Coal Co., 29 R. I., 254 * * * the indictment charged, in substance, that the five defendants did—

"'combine, confederate and conspire together by divers unlawful and fraudulent devices, contrivances, and acts, unlawfully to regulate the price at which coal should be sold in the said city of Providence, * * * which said coal was then and there an article of prime necessity to the public and the consumers thereof.'

"The defendants demurred, and the Court sustained the demurrer, holding that monopoly was the gist of the common-law offense, and that, as it did not appear from the indictment that the defendants had any power of control over the coal trade, they could not create a monopoly. The case raised the question whether every agreement to regulate the price of a prime necessary of life was criminal at common-law; and the Court, in sustaining the demurrer, decided that this was not so. The decision

implies that under some circumstances such agreements may lawfully be made.

* * * * *

"The result is: * * *

"That indictment No. 453 is adjudged insufficient in law, the demurrers thereto are severally sustained, and the defendants go therefrom without day."

In McLatchy *v.* King, 250 Fed. Rep., 920, we find the same principle. The McLatchy suit was to recover, under the Sherman Act, damages to plaintiff's business, which was that of trading in potatoes. The Court said:

"It is essential, in civil actions for penalties under the Sherman Act, as well as in presecutions thereunder, that the restraint of trade intended or accomplished shall be unreasonable in extent or shall be directly aimed at interstate traffic. No contention is made that the present case falls within the latter class. It is therefore necessary that the declaration should state facts showing unreasonable interference with interstate trade. The declaration contains no allegation as to the extent of the interstate trade in Aroostook County potatoes, either actually or relatively. For aught that appears, not more than 100 bushels of potatoes a year may have been shipped from Aroostook County, and the interference with the trade in them may have been an insignificant matter. It is not alleged that Aroostook County potatoes constitute a separate, recognized article of commerce, or that there was any trade in them as distinguished from other potatoes. In my opinion the declaration does not sufficiently describe the trade, a conspiracy in restraint of which is alleged."

See also

United States *v.* Quaker Oats Co., 232 Fed. Rep., 499;
United States *v.* Keystone Watch Case Co., 218 Fed. Rep., 502;
United States *v.* U. S. Steel Corp., 223 Fed. Rep., 56;
Standard Oil Co. *v.* United States, 221 U. S., 1;
United States *v.* American Tobacco Co., 221 U. S., 106;
Board of Trade *v.* United States, *supra.*

The latter cases all stand for the proposition that under the Sherman Law there must be an unreasonable restraint of trade. in order to constitute a violation of that statute.

It is well established that a covenant in partial restraint of trade is to be regarded as *prima facie* reasonable.

North-Western Salt Co. *v.* Electrolytic Alkali Co. (1914), A. C., 461;
Haynes *v.* Doman (1899), 2 Ch., 13.

In the North-Western Salt Co. case the House of Lords said:

> "In order to be valid, a clause imposing a restraint must be reasonable, and he who says that the restraint is so must make it out. But he will discharge this burden if he can point to other parts of the contract which shew the reasonableness of the restraining clause. If the contract read, as a whole, appears on the face of it not to be unreasonable in the interest either of the parties or of the public, that is enough, and the question is not one of evidence" (p. 470).
>
> "It may well be that such a contract was, in view of the powerful position of the appellants, the respondent's best way of securing a market and adequate prices" (p. 471).

"That it is 'clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will be on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties, the onus will be no light one.' My Lords, I desire to adopt this proposition as applicable to the question before us" (p. 473).

* * * * *

"Doubtless, the parties entered into the contract in order to make money out of it, probably by keeping up prices, but that is not conclusive, * * * your Lordships, have to decide this appeal as things stand here" (p. 481).

The case of Thomsen *v.* Cayser, 243 U. S., 66, cited by the Government, is not opposed, because the facts in that case showed an unreasonable combination and the Court in that case said:

"And monopoly it was; shippers constrained by their necessities, competitors kept off by the 'fighting ships.'"

This Court did not in the Thomsen case hold, as asserted by the Government, that the statute had "as a matter of law" been violated, but based its decision on the facts found by the District Court.

In the Haynes case the Court said:

"Where a man of sufficient age and business capacity knowingly enters into a contract of service which is only in partial restraint of trade, I think the onus lies on him to prove that it goes beyond what was reasonably necessary: see Horner *v.* Grover (1831), 7 Berg., 735, 744, where it is stated that 'unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering.' And see Rou-

sillon *v.* Rousillon (1880), 14 Ch. D., 351, 364-5, where Fry, J., shows that the case of Mallan *v.* May, 11 M. & W., 653, supports the above view, and adds that it was also his opinion that the burden of shewing that such a restraint was plainly and obviously beyond what the master's interests required rested on the defendant, the servant. And he further said, in effect, that that ought to be the rule of law, because the defendant is seeking to put a restraint upon freedom of contract, and he who does must shew that the purposes of freedom of trade require the freedom of contract to be so curtailed. And in Mills *v.* Durham (1891), 1 Ch. 576, 586, the present Master of the Rolls observes that the contention that you are to treat a restraint of trade as *prima facie* bad, and throw upon the person supporting it the onus of shewing that it is reasonable, is introducing a wholly unsound principle into the construction of documents. And other authorities to the same effect might be cited."

The case of *Rousillon* v. *Rousillon*, cited in the *Haynes* case, was cited with approval by this Court in *Dr. Miles Medical Co.* v. *John D. Park & Sons* Co., 220 U. S., 373. The *Dr. Miles* case will be dealt with at length *infra.*

The allegation that the defendant's goods are patented plus an allegation that defendant regularly sells and ships large quantities of such products to tire manufacturers and jobbers in the Northern District of Ohio and throughout the United States, who in turn resell and reship large quantities (collectively stated) to jobbers, vehicle manufacturers, retail dealers and the consuming public, falls far short of charging facts showing such unreasonable restraint or combination and does not overcome the *prima facie* validity of the defendant contracts. The defendant, admitting by its demurrer all

that the Government alleges, still asserts that there are no facts alleged which even approach sufficiency. The channels of interstate commerce may be glutted with valves, etc.; there may be many or few manufacturers thereof; defendant's agreements may be necessary, owing to the state of the trade in defendant's particular goods; there is no averment to show how many tire manufacturers or jobbers there are in Northern Ohio or in the United States, nor what proportion of them have contracted with defendant; there is nothing to show what percentage of the goods is handled by the retail trade—this retail trade not being restricted at all; there is no allegation as to what percentage of valves is sold by the tire manufacturers or jobbers to the consuming public. Furthermore, no allegation of unreasonableness or of facts upon which unreasonableness can be predicated is found in the indictment itself or as interpreted by the District Court, and the agreements annexed to the indictment show that defendant has an interest in the resale price which it fixes. The omission in the indictment of the basic averments to which we have referred above is a matter of substance; their omission destroys the whole pleading; this Court would not sustain a conviction if had thereunder, and the omissions would not be aided or cured by a verdict.

United States *v.* Hess, 124 U. S., 483.

In view of the District Court's interpretation of the indictment we conclude that this court, accepting such interpretation, will apply the statute (the Sherman Act) thereto, and we respectfully submit that it should be held that the statute requires allegations other than those which the District Court has found the indictment to contain, and that therefore the demurrer was rightly sustained,

and that the judgment of the District Court dismissing the indictment should be affirmed.

Furthermore, the indictment, charging a combination, does not name as defendants the persons with whom defendant has combined, nor does the indictment allege that the names of these persons are to the Grand Jurors unknown.

The indictment is therefore insufficient on that ground.

Second.—The conduct here involved does not constitute a combination in restraint of trade and commerce in violation of the Sherman Act, and in view of the District Court's interpretation of the indictment and of the agreements annexed thereto, it is open to this Court to state the law governing the agreements.

(A.) The indictment, as interpreted by the District Court, when reduced to the last analysis, attempts to charge the defendant with fixing resale prices on goods sold by it, but defendant contends that these prices are fixed under such circumstances that the defendant has a direct and specific interest in the resale prices themselves, and, further, that the agreements, insofar as they do fix resale prices, are reasonable. We deem that the question of the legality of defendant's contracts is open here, although we believe that the judgment should be affirmed under point "First" *supra.* This Court can consider this point "Second" as an additional reason for affirming the judgment, because in so doing this Court, although accepting the District Court's interpretation of the indictment, has before it, open to review, to the question of the construction of the statute, namely, the Sherman Law, which was before the District Court.

That part of the District Court's opinion or interpretation which is relevant to this "Second" point is as follows:

> "* * * The so-called license agreements, exhibited with the indictment, are in my opinion both in substance and effect only selling agreements. The title of the valves, valve parts, pneumatic pressure gauges and other automobile accessories passed to the so-called licensees and licensed jobbers. The privileges reserved in three of them to substitute at the so-called licensor's discretion, new stock for stock in possession of tire manufacturers and licensed jobbers, and the provision in all of them that upon termination for default or violation the licensor may reclaim all undisposed of stock, paying therefor the invoice price, does not change the transaction into a conditional sales agreement, or reduce the title of the tire manufacturers or licensed jobbers to a mere license to use in the meantime a patented article. The priveleges thus reserved are more in the nature of a right to repurchase than in the nature of a license to use or a conditional sale. The fact that a certain relatively small part of the price is to be paid only when the tire manufacturer has used these parts in making tires or when they have been sold to some other licensed jobber, or to dealers and consumers, and that this deferred payment is denominated a royalty, does not modify or control the legal force and effect of the transaction. This is merely a deferred payment of part of the sale price, and to this extent credit is extended to the tire manufacturer and the licensed jobber. All the rights, risks, burdens and privileges of ownership are with and are borne by the so-called licensees. The use of the word 'royalty' cannot be regarded otherwise than a subterfuge, intended only to give color to defendant's theory that articles of commerce covered by a patent, although sold and

> distributed through channels of trade in the customary way, may still be kept under the patent monopoly if the patentee has not as yet received the purchase price in full. This theory, in my opinion, is not tenable and that the authorities above cited are conclusive to the contrary.

Thus the District Court, in interpreting this indictment, has said that the agreements in question are in substance and effect only selling agreements; that the title to the valves, valve parts, pneumatic pressure gauges and other automobile accessories passes to the tire makers and jobbers, and that all the rights, risks, burdens and privileges of the ownership of such goods are with and are borne by the so-called licensees.

The word "dealers" wherever used in the agreements annexed to the indictment means "retail dealers" or "retailers," who are not in any way restricted in respect of resale prices.

Accepting this interpretation for the moment, defendant contends that the agreements are nevertheless valid and lawful for reasons which will be presently shown.

The Government argues that the agreements in question are invalid in that they deprive the licensees of freedom of selling their own property at any price they may choose. thus depriving interstate commerce of the stimulus of competition and enhancing prices to the public. To uphold this contention the Government relies on the case of *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S., 373.

The foregoing case, in brief, decides the proposition that where a vendor has parted with all of his interest in the goods in question, *and has also received the full consideration therefor*, he cannot control the resale price. Such decision does not decide the question here involved. De-

fendant contends that under the license agreements annexed to the indictment, it has a direct and substantial property interest in the resale price of the goods in question. That interest is this:

> "Seventh. As a royalty under said Letters Patent the licensee shall pay to the licensor the following:
> "1. On all Schrader Universal Valves and Valve Parts used by the licensee in the manufacture of the licensee's tires and tubes, four per cent. (4%) of the 'licensed jobber's' prices set forth in the annexed price list.
>
> "2. On all Schrader Universal Valves and Valve Parts distributed by the licensee to licensed jobbers and licensed vehicle manufacturers, four per cent. (4%) of the gross prices actually charged by the licensee to licensed jobbers and said licensed vehicle manufacturers.
>
> "3. On all Schrader Universal Valves and Valve Parts sold by the licensee to dealers, six per cent. (6%) of the licensee's actual gross selling prices.
>
> "4. On all Schrader Universal Valves and Valve Parts sold by the licensee to consumers, six per cent. (6%) of the licensee's actual gross selling prices" (Rec., p. 2 of Exhibit A).

The Government does not question the legality of the arrangement under Subdivision 1 of said "Seventh" paragraph of the agreements. Instead of being paid in full when it parts with the possession of the goods, the defendant is to receive a further and a substantial payment when the goods are resold by the tire makers and jobbers.

In none of the cases which have been before this Court did the vendor have this interest or property in the resale price. On the contrary, in each of those cases the

vendor had received the full consideration—had been paid in full—before parting with the goods.

It will be observed that the royalties under the agreements in the case at bar are in addition to the initial price and are not payable unless and until the goods have been used or sold by the defendant's vendees and that the percentage of the resale price which defendant is to receive is based on the *amount* of the resale price which the vendee *actually receives,* which must not be less than a minimum price, but which may be more, and that, therefore, the amount of the defendant's compensation is dependent upon the amount of the resale price when the resale comes to be made.

We quote from the cases heretofore decided by this Court and which, under the facts in those particular cases, hold to be illegal agreements by which a vendor sought to fix or maintain resale prices; the italics in each instance being ours.

In the case of *Bobbs-Merrill Co.* v. *Straus,* 210 U. S., 339 (p. 343):

> "The facts disclose a sale of a book at wholesale * * * *at a satisfactory price* * * *."

In *Dr. Miles Medical Co.* v. *John D. Park & Sons* 220 U. S., 373 (p. 409):

> "The complainant having sold its product *at a price satisfactory to itself,* the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

In *Bauer* v. *O'Donnell,* 229 U. S., 1 (pp. 11, 16):

> "The question, therefore, now before this Court for judicial determination, is: 'May a patentee by notice limit the price at which future sales of

the patented article may be made, *such article being in the hands of a retailer by purchaser from a jobber who has paid to the agent of the patentee the full price asked for the article sold?*

* * * * * * * *

"The patentee had *no interest in the proceeds* of the subsequent sales; *no right to any royalty thereon; or to participation in the profits thereof.*

* * * * * * * *

"They had the title to, and the right to sell, the article purchased *without accounting for the proceeds* to the patentee, *and without making any further payment* * * *."

In *Straus* v. *Victor Talking Machine Co.*, 243 U. S., 490 (pp. 498, 500):

"The plaintiff makes sure that the future shall have no risks, for it requires *that all it asks or expects at any time to receive* for each machine must be *paid in full* before it parts with the possession of it.

* * * * * * * *

"Courts would be perversely blind if they failed to look through such an attempt, as this 'License Notice,' thus plainly is to sell property *for a full price*, and yet to place restraints upon its further alienation. * * *

"It thus becomes clear that this License Notice is *not intended as a security for any further payment* upon the machine, for the *full price*, called a 'royalty,' *was paid before the plaintiff parted with possession of it.*

* * * * * * * *

"Title to the machines ultimately vests in the 'ultimate users' *without further payment* * * *."

In *Motion Pictures Patent Co.* v. *Universal Film Manufacturing Co.*, 243 U. S., 502 (pp. 508, 515):

> "It is admitted * * * when sold it [the machine] was *fully paid for.*
>
> "Until at length the case at bar is reached with a machine sold *and paid for* * * *."

In *Boston Store of Chicago* v. *American Graphophone Co.*, 246 U. S., 8, page 26, the question certified to this Court, and answered, was:

> "Can a patentee, in connection with the act of delivering his patented article to another *for a gross consideration then received*, lawfully reserve by contract a part of his monopoly right to sell?"

and in that case this Court, commenting on the ruling in the Motion Pictures case, said (p. 25):

> "Reiterating the ruling in the two last cases it was again decided that, as by virtue of the patent law, one who *had sold* a patented machine *and received the price* * * * could not * * * keep under the patent monopoly a subject to which the monopoly no longer applied."

We are not, in this connection, discussing the effect of the patent law or claiming that by reason of the reservation of a substantial royalty the defendant's goods did not pass from under the patent monopoly. We will discuss this phase of the case later on in this brief.

Our contention here is that in no case has it been decided that the Sherman Law governs a state of facts like that in the case at bar, where the vendor has not sold "at prices satisfactory to itself"; where the vendee has not "paid the full price for the article sold"; where the vendor has an "interest in the proceeds of the subsequent sales" and the right to "participation in the profits thereof"; where the vendee has not the right to

sell the article purchased "without accounting for the proceeds" nor "without making any further payment"; where the vendor does not make sure "that all its asks or expects at any time to receive" for the goods must be "paid in full" before it parts with the possession of them; and where there is nothing showing that the agreements are in unreasonable restraint of trade.

In the case at bar not only has the defendant the right to a further payment; not only has it a direct, substantial and pecuniary interest in the resale price, but such further payment is contingent upon the making of the resale, for if the tire maker or jobber does not sell the goods the defendant gets no further payment, and such further payment is not even fixed in amount, for the amount thereof depends upon the price for which the goods are sold by the tire makers and jobbers.

Where a vendor has a pecuniary interest in maintaining the resale price, and no monopoly is effected, such vendor may lawfully contract with vendees who agree to adhere to fixed prices.

> Dr. Miles Medical Co. *v.* John D. Park & Sons, *supra;*
> Fisher Flouring Mills Co. *v.* Swanson, 76 Wash., 649;
> Rawleigh Medical Co. *v.* Osborne, 177 Iowa, 208.

At common law such agreements as those in the case at bar are valid; nothing in the Sherman Act makes them illegal; and this Court has made it clear beyond question that in the cases heretofore decided it has decided no more than was directly in issue in those cases respectively.

In *Bauer* v. *O'Donnell, supra* (p. 17), this Court, quoting from Adams *v.* Burke, 17 Wall., 453, says:

> "The vast pecuniary results involved in such cases, as well as the public interest, admonish us to proceed with care, and to decide in each case no more than what is directly in issue."

And in the *Boston Stores* case, this Court, after reviewing the *Bobbs-Merrill* case; the *Dr. Miles Medical Company* case; the case of *Bauer* v. *O'Donnell;* the *Victor Talking Machine* case and the *Motion Pictures* case, says (p. 26):

> "In addition, through perhaps an abundance of precaution, we direct attention to the fact that nothing in the decided cases to which we have referred, having regard either to the application of the general law or of the patent law, deprives an inventor of any right coming within the patent monopoly, since the cases alone concerned whether the monopoly of the patent law can be extended beyond the scope of that law, or, in other words, applied to articles after they have gone beyond its reach."

In each of those cases the vendor *had received the full price for his article,* all that he ever was to get for it, and still sought to annex conditions to the resale. In the case at bar the defendant has not received the full price for it, since a very substantial part depends upon the resale and upon the amount of the resale price.

The District Court held that the use of the term "royalty" in defendant's agreements cannot be regarded as other than a "subterfuge." This was said in connection with defendant's claim that the defendant is a patentee; that the agreements are license agreements; that the reserved payment is a "royalty," and that the patent law ap-

plies, this case differing from those cited, because in those cases the patentee had been paid in full. The District Court did not say and did not intend to suggest that the interest of the defendant in the resale price was not a substantial one nor that it was not duly and regularly collected, or that it was in other respects a subterfuge, but only that the use of the word "royalty" was a "subterfuge" for what was, in the language of the District Court, merely a "deferred payment."

Thus this Court has open for decision the very question now presented. We assert that a vendor of personal property, whether patented or unpatented, can lawfully sell same on condition that the purchaser will resell at no less than fixed prices, provided the vendor has a direct and substantial property interest in the resale price.

Lord Coke said:

> "If a man be possessed of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, on condition that the donee or vendee, shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is against the trade and traffic and bargaining and contracting between man and man."
>
> 2 Coke on Littleton, Sec. 360.

Lord Coke, however, did not say that it is unlawful for a man who is possessed of a chattel to sell same on the condition that it shall be resold by the vendee at not less than a certain price and that a percentage of such resale price shall be paid over to the vendor by his vendee after the resale is made.

This difference is well illustrated by taking the following supposed cases:

1. A sells a machine and receives the full purchase price at the time of sale, and as a part of the contract of sale annexes a condition that the vendee cannot resell at less than a certain named price.

2. A sells a machine and receives a part of the purchase price at the time of sale, and as a part of the contract of sale annexes a condition that the vendee cannot resell at less than a certain named price and that the vendee will on resale pay to the vendor a part of such resale price.

(a) The condition as to resale in (1) above is bad under the *Dr. Miles Medical Company* case and under the *Boston Stores* case, *supra.*

(b) The condition as to resale in (2) above is good under the law of contracts and does not contravene the Anti-Trust Laws.

Going back to the fundamentals of the law of contracts, we find this: A person may make any contract which he sees fit to make so long as such contract is not *malum in se* or *malum prohibition.* A person engaged in a private business may exercise his own discretion as to the parties with whom he will deal and he may prescribe the terms on which he will deal up to a point where his attempt to control passes the line between lawful and unlawful contracts. So the controversy here centers about the question whether the defendant's contracts have clearly passed the prohibited line. We say "clearly passed" the line because the law favors freedom of contract, and he who asserts the invalidity of a contract in restraint of trade has the burden of proof.

North-Western Salt Co. *v.* Electrolytic Alkali Co., *supra*;
Haynes *v.* Doman, *supra;*

Or as was said in the Haynes case just cited:

> "the defendant is seeking to put a restraint upon the freedom of contract, and he who does must shew that the purposes of freedom of trade require the freedom of contract to be so curtailed."

We think that this Court may well, in any case, exalt the freedom of contract over supposed public policy unless the public policy involved in a particular case is clearly and surely in need of protection.

The Government claims that the defendant's contracts are *malum prohibitum.* But where is to be found the law which prescribes that it is unlawful for a vendor of goods to agree with a vendee that when the vendee sells the goods he must sell them at not less than a minimum price and then pay to the vendor a percentage based on the resale price? (The Clayton law is not involved here.) Can it be asserted that if one of defendant's vendees fails to maintain minimum prices defendant is not directly affected? Defendant, in the view of the District Court, is extending credit to its licensees. This "credit" is not, however, like the credit in the *Dr. Miles Medical Co.* case, the usual commercial credit, for it is not fixed either as to time or amount. The defendant is directly interested in the resale price and in the amount thereof and in the resale itself upon which its further profit depends. The hypothesis on which the Government seeks to base the prosecution of the defendant rests ~~on the goods in question and therefore has no property interest~~

on the doctrine that the defendant has parted with the title to

in the goods when resold. This hypothesis entirely overlooks the fundamental fact that the sales under the agreements in question are sales on condition, namely, a condition that on resale, the vendee will pay the defendant something more. The defendant, under the circumstances, may have only a fanciful interest or no interest at all in the goods themselves, but it has a very real, substantial and pecuniary interest in the resale price. The Government claims that such a condition is bad, but cites no authority to support such contention. In no other case which we have been able to find has the defendant had a direct property interest in the resale price. That this interest is not fanciful is shown above and can be illustrated. Suppose that the defendant does a substantial business and sells, for example, $10,000,000 worth of goods to tire manufacturers and that the manufacturers use $6,000,000 worth of these goods and resell $4,000,000 worth, the "deferred payment" at 4 per cent. on the used goods would amount to $240,000 and the "deferred payment" on the resold goods would amount to $160,000 if sold to jobbers or vehicle manufacturers, and would amount to $240,000 if sold by the tire manufacturers to dealers. It should be borne in mind that "dealers" mentioned in the agreements are retailers, who are not restricted at all. Who can say that such interest in the resale price is only fanciful? The defendant's "royalty" is based on the resale price and should one of its vendees receive more than the minimum price for the goods in question, then the defendant would be entitled to a percentage of the enhanced price. The "deferred payment" is a part of the sale price of the goods in question, and until the defendant receives this "deferred payment" it has not, to quote from the opinion in the *Dr.*

Miles Medical Co. case, "sold its product at prices satisfactory to itself." If the vendee did not agree to pay the defendant the initial part of the purchase money and also the deferred payment, called a "royalty," the vendee would not get the goods. The defendant can keep its goods or it can sell them outright or it can sell them on condition—a condition under which it still retains an interest in the goods or in their equivalent—the resale price. If it sells the goods outright and receives the full consideration, then it cannot control the resale price for the reason that it has no property interest in such resale price and the public is entitled to the benefit of the play of competition between defendant's vendees. But if the defendant sells its goods on condition, i. e., that when its vendee sells the goods the vendee must pay to defendant a "royalty" or "deferred payment" based on a percentage of the resale price, the vendor has not received the full consideration and therefore has that direct property interest in the resale price which has been absent in every other case which has been before this Court.

The Government cannot upon this record point out facts which show that the defendant's contracts constitute a combination in unreasonable restraint of trade.

The agreements in question do not prohibit retail dealers from doing what they will with the defendant's goods, for the District Court, in interpreting the indictment, said (Rec. 38):

> "Let me repeat the retailers are not in the present case included. They may compete freely with one another and may even give away the articles purchased by them. No restriction is imposed which prevents them from selling to the consumer at any price, even though it be at a ruinous sacrifice

and less than the price made to them by the jobber."

Before the Government can make a case it must show that defendant's agreements are unreasonable, because an agreement which is not in unreasonable restraint of trade is good.

There is not a fact in the record from which the Government is entitled to assert the conclusion that there is here disclosed an unreasonable combination to restrain interstate trade. Before such an assertion can be properly made there must be in the record facts, circumstances, comparisons, figures, etc., from which the Court can draw conclusions. There is no showing here as to the extent of defendant's trade, no facts as to what percentage of its trade is with tire manufacturers or with jobbers, nothing to show but that sales to the retail trade constitute 90 per cent. of the sales by the tire makers and jobbers of the defendant's goods, the retail trade being wholly unrestrained; nothing to show that the plan pursued by defendant is not warranted by the state of the business in which defendant is engaged. Price fixing is not illegal *per se.*

> Dr. Miles Medical Co. *v.* John D. Park & Sons, *supra;*
> Fisher Flouring Mills Co. *v.* Swanson, *supra;*
> Rawleigh Medical Co. *v.* Osborne, *supra.*

Since this is so, the Government has clearly failed to make out a case. We are here on the record and not on conjecture, and it is respectfully submitted that on the record this Court should hold that the Government in the indictment has not stated facts (admitted by the demurrer) from which it can be determined that the defendant's

agreements are bad in law, and should hold that the agreements are good, and not in unreasonable restraint of trade.

It must be remembered that the defendant can legally refrain from any dealing with any person whomsoever and the consequence of this legal right is that if it chooses to deal it can deal on its own terms so long as it does not seek to project itself beyond that line where it does not have a property interest in the thing sought to be accomplished.

Since the Government claims that the *Dr. Miles Medical Co.* case, *supra*, has an important bearing on this case, we believe that, before closing this phase of the argument, it will be helpful to compare the important facts and principles of that case with the principal facts in the case at bar:

(a) In the *Dr. Miles* case the Court said, pages 396, 397:

> "The consignee agrees 'to sell only to the designated retail agents of said proprietors, as specified in lists of such retail agents furnished by said proprietor, and alterable at the will of said proprietor.' A further provision permits sales 'only to the said retail or wholesale agents of said proprietor, as per list furnished.' No time is fixed for the duration of the agreement."

In the case at bar there is no attempt to designate the persons to whom defendant's product can be sold, so far as retailers and the consuming public are concerned, except that the licensee is not licensed to sell to any manufacturer, jobber, dealer, or person who shall be named by the licensor as one to whom the licensor itself will supply exclusively its patented valves. This dissimilarity between the two cases is important. There is nothing in this record which shows that this defendant has ever named a single

person as one to whom the defendant will supply exclusively its patented valves. Furthermore, defendant's agreements run only for the season 1917-1918, and this season ended August 31, 1918.

(b) In the *Dr. Miles* case the Court said, page 399:

> "It is, as we have seen, a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or sub-purchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition."

In the case at bar there is no attempt to fix the prices at which retailers may sell the defendant's goods. Competition among them, therefore, has full play, and hence restrictions are less far-reaching than those imposed in the Dr. Miles case.

(c) In the *Dr. Miles* case the Court said, page 400:

> "That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with 'most of the jobbers and wholesale druggists and a majority of retail druggists of the country' and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade and commerce among the several states, is also clear." [The bill showed "that such contracts were in force between the complainant and over four hundred jobbers and wholesalers and twenty-five thousand retail dealers in proprietary medicines in the United States, p. 381."]

In the present case there is nothing in the record to show the extent of defendant's trade, nor what number of tire

manufacturers or jobbers have entered into the agreements, and there is no allegation that defendant controls the entire trade, or even substantially the whole of it, and we may assume that if this had been the fact the Government would have so alleged.

(d) In the *Dr. Miles* case the Court said, page 404:

> "The basis of the argument appears to be that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety of the restraint is sought to be derived from the liberty of the producer."

The above statement was made because the Dr. Miles Medical Co. had only a fanciful interest in the resale price which it sought to fix. It was projecting its liberty to contract into a field where it had no property interest. Property interest must be present in order to sustain the right to fix resale prices. In the case at bar such property interest is present.

(e) In the *Dr. Miles case* the Court said, page 405:

> "Whatever right the manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, but upon agreement."

In the case at bar the right of defendant stands not only upon agreement, but upon a direct property right in the resale price.

(f) In the *Dr. Miles* case the Court said, page :

> "To sustain the restraint, it must be found to be reasonable both with respect to the public and to

> the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case for the protection of the covenantee."

In the present case there is nothing in the record to show that the restraint is not reasonable or that it is not limited to what is fairly necessary for the protection of the defendant.

(g) In the *Dr. Miles* case the Court said, page 407:

> "The agreements are designed to maintain prices after complainant has parted with title to the articles and to prevent competition among those who trade in them. * * * The bill asserts the importance of a standard retail price, and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant."

Here we perceive a radical difference between the Dr. Miles case and the present case. In that case the advantage of established retail prices primarily concerned the dealer because the Dr. Miles Co. had no interest whatever in the resale prices except a fanciful interest. Here the defendant is as much concerned with the resale prices as are the sellers themselves because defendant's "royalty" is affected by the amount of the resale price.

(h) In the *Dr. Miles* case the Court said, page 409:

> "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

In the present case the defendant does not sell at a price satisfactory to itself until it also gets its "deferred payment." The defendant does not know when it is to receive the full price for its goods, nor does it know what is the full price, until the goods are actually sold by the licensee. Under the District Court's interpretation, title to defendant's goods passes before the payment of the "royalty," but defendant has a direct property interest in the resale price; and as the retailers are free to compete as much as they see fit, the public thereby obtains whatever benefit there may be in competition.

There can be no unlawful "combination" so long as the defendant has a property interest in the resale price with which it seeks to deal, an interest in the resale price being just as good in law as an interest in the goods themselves. Under such circumstances, the defendant is but dealing with its own individual business—pursuing its own policy, and the Government cannot interpose a restraint under such circumstances. There is neither upon the face of the indictment nor under the interpretation of the District Court, a statement of facts sufficient to charge a crime. The Government has been misled by the supposition that price fixing is illegal *per se.* Counsel has been unable to find that any court has ever so decided.

As to the Patent Law.

(B) Defendant's agreements, if made with a single individual, would be valid at common law. They are not invalid simply because made with many. The multiplication of a valid agreement can be held invalid, if at all, only because of its far-reaching effect, but in the present case the patent law protects the defendant, for under its provisions that is reasonable which otherwise might be un-

reasonable. In other words, the defendant, having a valid common law agreement which relates to a patented article, can contract to sell that article and arrange to receive a part of the resale price, and until defendant receives its part of the resale price, the transaction is not without the operation of the patent law. If, under such circumstances, the patent law and the Sherman Law clash, the patent law will prevail.

> E. Bement & Sons *v.* National Harrow Co., 186 U. S., 70.

So long as the patent law can be invoked there can never be a monopoly in this type of cases within the meaning of the Sherman Anti-Trust Act. In the *Bauer, Victor, Motion Picture* and *Boston Stores* cases, the patent law could not be successfully invoked because the vendors did not come into court with a valid common law agreement, they having received for their patented devices all that they ever expected to receive.

(C) Even on the assumption that defendant's contracts are nothing but selling agreements, they are valid contracts under the patent law.

A patent is essentially a monopoly. By it the patentee obtains the right to exclude all others from selling the patented article. Conversely, he has the right to include all others, or as many separate persons, as he pleases. In other words, he has an undoubted right under his monopoly to license as many persons or concerns as he pleases. If each of his licenses is legal at common law, it follows that they are all legal under the patent law. The maker of unpatented chattels may be argued not to have this right of exclusion or inclusion, but certainly there is no doubt that a patentee having the right to

exclude the entire public, may select a certain proportion of the entire public whom he will not exclude.

But we believe that the case should be decided upon broader grounds than these. We will hence proceed to a further discussion of the legality, under the Sherman Act, of a patentee acting within his patent monopoly.

A patentee who fixes the resale price of his goods on resales made before the royalty has been paid, is doing a perfectly legal thing under the Sherman Act, and any restraint of trade thereby effected is a valid restraint.

The District Court, in interpreting the indictment, arrives at the conclusion that the defendant is manufacturing under letters patent, and that it grants so-called "license contracts" to certain wholesalers, and that there is a certain reserved payment coming to the defendant after the sales, which is denominated a "royalty."

These agreements have all of the necessary elements of license agreements, containing the formal grant of the license, the provision for the payment of royalties, detailed and carefully drawn safeguards for the keeping of account of sales, and the submission of statements. The royalty is a substantial and adequate one, customary in similar cases.

It would be difficult to choose any language more effective to indicate a patent license than that included in the agreements. Certainly all of the provisions of these agreements with regard to the grant of the license and the payment of the royalty should not be tossed aside and distorted from their plain and unequivocal intent.

The District Court in interpreting the indictment comes to the conclusion that the Sherman Law, as construed by the Supreme Court, impelled the District Court to hold that these contracts are not license agree-

ments, and that patented chattels stand on the same fotting as unpatented chattels.

It seems to us that the real question is:

Has a patentee the right to retain control over articles covered by his patent and for which he has received *no payment* under the patent? The defendant receives present payment for the goods but nothing under the patent until it receives the royalty. If it has the right under the patent law to retain this control, it is certainly a valid thing under the Sherman Law. It scarcely needs a citation of cases to show that if a patentee is proceeding under the patent monopoly, he is not committing an infraction of the Sherman Law.

The District Court has said that title passes to defendant's goods when they reach the wholesalers' hands. But this, we submit, has nothing to do with the question involved. The real question involved is whether the patentee has received the full consideration which he charges for releasing the goods from the patent monopoly. In the present instance defendant has not received any part of such consideration until after the sale by the wholesaler is made. In other words, he has had absolutely none of the tribute under his patent, and it is *all* due him.

We think the District Court overlooked the fact that the patent right concerns itself exclusively with the right of a patentee to control goods in which he has *no property interest.* It has been decided many times that the law grants to the patentee no right of manufacture, use or sale which he did not have before. In other words, with regard to the patented devices which *he owns,* the law neither subtracts from, nor adds to, them.

It is solely with the goods which he *does not own* that the law concerns itself.

Practically every suit for infringement concerns itself with goods in which the patentee has no property interest. If the infringing goods fall within the patent, the patentee has the right to absolutely control or suppress their sale, although he does not own them, never has owned them, or never will own them. The right of a patentee to exclude others from making, using or selling, therefore, depends not at all on the ownership of the patented devices themselves.

We believe that the District Court has entirely misconstrued the nature of the decisions of this Court in *Bauer* v. *O'Donnell* and the cases subsequent thereto.

Long before the *Bauer* v. *O'Donnell* case it was recognized patent law that while the patentee had the right to control the patented goods, nevertheless when he, the patentee, owned the goods and sold them without any notice of any restrictions, he was conclusively presumed to have given a full license for use and sale to the purchaser. Or to use a short phrase, such goods were held to be "taken outside of the patent monopoly." But this was not because the patentee did not own the goods after sale. It was because when the patentee himself sold a patented device in the absence of any restrictions or conditions, the purchaser was entitled to assume that he had a full right to use the patented device and sell it, as he pleased. Or, in other words, the patentee was estopped to assert any claim or control when he did not assert it at the time that he should have asserted it, namely, in the act of sale.

As we understand the Bauer decision, it amounts merely to this: That the old doctrine of unconditional sale of a patented structure is extended to that case where the patentee has received the entire consideration

for the release of the device from the patent monopoly. Proceeding from the old law of unpatented chattels which prohibits the placing of restrictions upon articles after they have been bought and paid for, this doctrine is extended to patented chattels after they have been bought and paid for.

In the case of unpatented chattels, it may be a very pertinent inquiry as to whether the title to the chattel has passed from the owner, since it is only under special circumstances that control of unpatented goods can be maintained when title has passed.

But under the patent law, it is a matter of complete indifference whether title has passed or not if the right to use or sell has not been passed. The holding of the Bauer and subsequent decisions is, as we understand it, that after the patented devices have changed hands and the patentee has received all he ever expects to receive, then it is futile for him to assert a control over the goods. But in all these cases the total consideration had been paid. This was not only the consideration for the machine itself, but included in it was the *royalty for the use of the invention.* In defendant's case the thing which is paid for is merely the physical device. None of the consideration for the use of the invention is paid while the defendant asserts any control over the goods.

To say that defendant, as a patentee, loses control because of change of title so that he no longer owns the device would be a blow at the very vitals of the patent law. We have shown, we think, that practically the only power given by the patent law to the patentee is just such control over goods which he does not own.

It has been alleged that defendant's motives are improper in issuing such license agreements. In a proceed-

ing of this kind, defendant is estopped from showing its motives, and we submit that it cannot be assumed to have had improper motives, if such are possible, where defendant has no opportunity to rebut the assumption.

The indictment alleges that the result of the various licenses was that prices were maintained and enhanced. This is obviously not an allegation of an improper motive, since many prices may be maintained and enhanced without improper motive on the part of anyone.

But the motives of a patentee are not open to question where he is exercising the right granted to him by the Government. The patent law makes no mention of the motives of the patentee, as to whether he shall charge reasonable or unreasonable prices, as to whether he shall license one man and not another for reasons which may be entirely vicious; as to whether he withholds the benefits of his invention from the public for motives which are honest or dishonest. So long as he is squarely within his monopoly, he may proceed with the best or the worst motives.

Therefore, it would seem certain that so far as this branch of the case is concerned, defendant's motives may not be questioned. But as the question as to whether prices are or are not enhanced is not open, we submit that the sole point in issue on this branch of the case is whether or not the defendant is proceeding within the bounds of its patent monopoly. If so, its conduct is entirely lawful within the Sherman Law, and any possible restraint of trade resulting is a reasonable restraint, and one which is not contemplated by the Sherman Act.

The decisions in Bauer v. *O'Donnell and subsequent cases uphold defendant's conduct.*

The *Bauer* case announced no new doctrine, but merely an extension of an old doctrine—that a patentee having unconditionally sold his patented devices and having received the consideration for the release from the patent monopoly, could not afterwards control the patented goods. In other words, having sold unconditionally and received the royalty, the goods passed out from under the patent monopoly. As in any other case, the main point is the payment of the consideration. While a patentee *may*, if he chooses, give away his patented devices, and while he *may* permit others to use them freely in advance of the payment of royalty, yet when he refuses to release the goods in advance of the royalty, or refuses to release them fully, he is acting squarely under the patent law, and the goods do not become released until the royalty is paid. Having once received it, however, his control over the goods ceases.

As early as *Bloomer* v. *McQuewan*, 14 How., 539, it was held that the patentee *having once received his royalty* upon such a device, he cannot treat the subsequent seller or user as an infringer.

In *Adams* v. *Burke*, 17 Wall., 453, it is said:

> "But in the essential nature of things when a patentee, or person having his rights, sells a machine or instrument whose sole value is in its sale, he receives the consideration for its use, and he parts with the right to restrict that use. The article, in the language of the Court, passes beyond the limit of the monopoly. *That is to say*, the *patentee, or his assignee, having in the act of sale received all the royalty or consideration which he claims for the use of his invention* in that particular machine

or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees." (Italics ours.)

In *Mitchell* v. *Hawley*, 16 Wall., 544, it was stated:

"* * * but when they [the patentees] have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled *but to one royalty* for the patented machine, and consequently a patentee, when he has himself constructed a machine and sold it without any conditions, or authorized another to construct, sell and deliver it, or to construct and use and operate it without any conditions and the consideration has been paid to him for the thing patented, the rule is well established that the patentee must be understood to have parted to that extent with all his exclusive right, and that he ceases to have any interest whatever in the patented machine so sold and delivered, or authorized to be constructed and operated."

In *Bauer* v. *O'Donnell*, *supra*, following this recognized principle, the Court said, pages 16, 17:

"The patentee *had no interest in the proceeds of the subsequent sales, no right to any royalty thereon or to participation in the profits thereof* * * *.

"The appellee and the jobbers from whom he purchased were neither the *agents nor the licensees of the patentee*. They had title to and the right to sell the article purchased without accounting for the proceeds to the patentee, and without *making any further payment* than had already been made in the purchase from the agent of the patentee." (Italics ours.)

As we read the *Bauer* decision, this Court, out of the abundance of caution lest the decision be expanded to

overthrow well recognized rights, quoted (p. 17) from *Adams* v .*Burke, supra,* as follows:

> "The vast pecuniary results involved in such cases as well as public interest, admonish us to proceed with care and to *decide in each case no more than what is directly in issue.*" (Italics ours.)

The Court also takes pains to quote the following language from *Adams* v. *Burke*:

> "That is to say, the patentee or his assignee having in the act of sale *received all the royalty or consideration which he claims for the use of his invention,* in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly *and paid for?* page 498. (Italics ours.)

In *Straus* v. *Victor Talking Machine Co., supra,* the Victor Company had disposed of its patented phonographs for the full price and attempted by a legal fiction to exercise control over the price at which they could be resold. The decision is replete with language in support of defendant's position in this case:

> "* * * or is it a disguised attempt to control the prices of its machines after they have been *sold and paid for.* (Italics ours.)
>
> "* * * the plaintiff makes sure that the future shall have no risks, for it requires that *all it asks or expects* at any time to receive for each machine *must be paid in full* before it parts with the possession of it. (Italics ours.)
>
> "It thus becomes clear that this license notice is not intended as *a security for any further payment* upon the machine, for the *full price, called a royalty, was paid before the plaintiff parted with possession of it* * * * (p. 500).

> "Courts would be perversely blind if they failed to look through such an attempt, as this 'license notice' *thus plainly is to sell property for a full price,* and yet place restraint upon its further alienation" (p. 500). (Italics ours.)

In the *Motion Picture Patents Company* v. *Universal Film Co., supra,* the question was one of the restrictions which a patentee could put upon the *use* of his machine after the machine had been bought and paid for in full. in this case in construing Bauer *v.* O'Donnell, the Court said (p. 516):

> "* * * the right to vend is exhausted by a single *unconditional* sale, the article sold being thereby carried outside of the monopoly of the patent law * * *." (Italics ours.)

Obviously, a sale which is not unconditional, and for which the patentee has received no royalty, cannot carry the article outside of the monopoly of the patent law.

These various decisions of the Supreme Court were again carefully expounded in the case of the *Boston Stores Co.* v. *American Graphophone Company, supra.*

In commenting on the *Bauer* v. *O'Donnell* case the Court, in the *Boston Stores* case, said in effect that when an article was *sold* by a patentee, he ceased to have the right to restrict its future sales. That he could not *use* and *exhaust* the right to sell and yet by conditions and stipulations continue that law in effect so as to make it govern things which by his voluntary act were beyond its scope. The Court further said in effect that when an article "had been sold and been passed beyond the monopoly given by the patent law" remedies on the theory of infringement were not applicable.

It would seem unescapable that in the use of the words "sell" and "sold," the Court had in mind only unconditional sales for a full price then received. Obviously, the Court was not speaking of conditional sales, nor was it speaking of sales in which the royalty under the patent was not paid. The royalty or payment under a patent is the express and only consideration for which the patentee *releases* his *patent right.* It is his sole return usually for the grant. To hold that a patentee has no right over patented articles before he receives this consideration would be a blow at the fundamental principles of patent law.

So, also, in its comments on the *Straus* v. *Victor* case the word "sold" was undoubtedly used in the same sense of an unrestricted sale, or a sale for a full consideration received presently.

The same statement, is, we think, entirely true of the comments of the Court on the *Motion Picture* case.

The Court, in the *Boston Stores* case (p. 25), further said:

> "Comprehensively reviewing the subject, it was decided that the ruling in Bauer *v.* O'Donnell and Straus *v.* Victor Talking Machine Company conflicted with the doctrine announced and the right sustained in Henry *v.* A. B. Dick Co., and that case was consequently overruled. Reiterating the ruling in the two last cases, it was again decided that as, by virtue of the patent law, one who had sold a patented machine and *received the price* and had *thus* placed the machine so sold beyond the confines of the patent law, could not by qualifying restrictions as to use keep under the patent monopoly a subject to which the monopoly no longer applied." (Italics ours.)

In conclusion the Court stated that the attempt in the argument to distinguish the *Boston Stores* case from the prior cases on the assumption that the prior cases rested on the form of the notice, is devoid of merit,

> "since the argument disregards the *fundamental ground upon which, as we have seen, the decided cases must rest.*" (Italics ours.)

This fundamental ground, as we see it, is that a patentee cannot sell goods for a price which is satisfactory to him and which includes his royalty and which price has been fully paid, and then impose conditions upon the sale or use of the goods.

The Court, however, is careful to point out that

> "nothing in the decided cases to which we have referred, having regard either to the application of the general law or the patent law, deprives an inventor of any right coming within the patent monopoly, since the cases alone concerned whether the monopoly by the patent law can be extended beyond the scope of that law, or, in other words, applied to articles after they have gone beyond its reach (p. 26)."

We have already seen that the patent monopoly is not dependent upon the patentee's ownership of the goods; that on the contrary the basic right conferred by the patent monopoly is the right of controlling the patented goods which the patentee does *not* own.

Hence it is quite clear that the mere passage of title, if it really be passed, of defendant's patented goods does not take the goods from under the patent monopoly.

The true test is whether the licensee has given the patentee the consideration for the release from the patent monopoly, namely, the royalty. The defendant has stated

to the licensee that he cannot have a full right to use and sell while this consideration is unpaid. We again call attention to the fact that this royalty is the sole consideration for the release from the patent monopoly, and it is the only consideration. It is not a small or negligible part of the consideration for the release. It is one hundred per cent. of it—it is the entire consideration.

We are familiar with no case which holds that where a patentee has refused to release a patented device from the patent monopoly until the full consideration is paid that the patented device is as a matter of law released until this consideration is paid as a matter of fact. The patentee may, if he wishes, release the device, and may agree to release the device at some time prior to full payment, but so long as that release does not take effect according to the terms of the license we submit that the inevitable conclusion is that the device remains under the patent monopoly until the patentee by his deliberate act releases it, and this is true irrespective of whether the title to the device as a mere thing passes, or whether it does not pass.

Finally, the decision in the *Boston Stores* case becomes clear upon a reading of the third question certified (p. 27):

> "3. Can a patentee in connection with the act of delivering his patented article to another for a *gross consideration then received* lawfully reserve by contract a part of his monopoly to sell." (Italics ours.)

This question was answered in the negative, but it does not apply to the present case, and we submit cannot apply, since the gross consideration is not received according to

defendant's licenses until after the jobber has sold the goods to the retailer.

Of these various cases that of *Victor* v. *Strauss, supra,* is the only one which requires any more extended consideration.

In this case the Victor Company received at the time of the alleged license every cent which it ever expected to receive, or which in fact it did receive. Here again the leading principle was that a patentee who fixes a price which includes the value of the goods, *and his patent royalty,* and receives this price in full cannot hold the goods under the patent monopoly.

The decision, as we understand it, was based upon the fact that the Victor Company had retained no substantial right either as an owner of the goods or as a patentee. It had attempted by a form of words to do so after it had received its gross return, including the selling price and the royalty.

There would appear to be no doubt as to what this court's decision would have been if the Victor position had been based upon fact instead of upon fiction.

If the Victor Company had parted with title to the phonographs themselves, as mere chattels, and had, however, continued to receive an annual royalty for their use under the patents, undoubtedly as a matter of law it would have had the right to have prescribed the terms upon which the phonographs could have been passed from one hand to another, since, as we have seen the mere matter of ownership has no bearing upon the rights given by the patent statute.

But the Court was unable to find any evidence of a bona fide license agreement.

It is evident from the decision that the Court searched

carefully for some real evidence that the Victor Company had done anything but make an absolute sale with full consideration paid, both for the goods themselves and for the tribute under the patent. The search was in vain.

Hence the Court applied the rule in the Bauer case, which as we have stated, was merely an extension of the old unconditional sales' rule, namely, that when a patentee obtains the full price for his goods, which necessarily includes the full royalty consideration for the release, he cannot fasten restrictions upon the goods.

There is nothing fictitious about defendant's license contracts, but unusual pains are taken to protect and safeguard defendant's rights until the goods pass out from under the monopoly of the patent. With regard to the goods themselves, they are in the hands of defendant's licensees and not in the hands of the general public, or some undiscovered person. When they pass from the hands of defendant's licensees, they are freed from the monopoly not only in fact but by operation of law. Defendant safeguards the stock itself by providing for the exchange of fresh goods for old, or the right of the return of the goods in certain instances. The royalties are safeguarded as effectively as is humanly possible. The royalties are not negligible, but substantial.

In the Victor case the alleged property or patent interest in the goods was not safeguarded, and there being no royalty unpaid, of course, there was nothing to safeguard in the way of payment.

In concluding this branch of the case we submit that defendant's licenses fall strictly within the confines of patent law; that defendant's goods are not released from the patent monopoly until the resale is made; that the passage of title, if it be passed, to the licensee has no bearing on this question.

We venture further to submit that were it not for the Sherman Act, the fact that defendant's goods remained under the patent monopoly until the consideration is paid would never be questioned, and that defendant's right to sue as an infringer a licensee who went beyond the terms of his license would be admitted.

But this Court has decided that if a patentee is acting within his monopoly, the Sherman Act does not apply.

Finally, we would state that the right of a patentee to fix the price of sale of the patented goods in the hands of a licensee has been squarely upheld by this Court under conditions where the patentee had not received his royalty.

In *E. Bement & Sons* v. *The National Harrow Company, supra*, this precise situation was present. The only difference was in that case the patentee had never owned the goods. But as this is a negligible factor under the patent law, the same rule should apply in this case as applied in the Bement case.

As to the Government's Brief.

The Government argues that the reasonable fixation of prices to defendant's licensed wholesalers has the inevitable result of enhancing the price to the consumer, and that this is true, notwithstanding the fact that the bulk of the trade, namely the retailers, are perfectly free to compete.

The theory is that if the jobber, for instance, could sell cheaper to the retailer, the retailer could sell cheaper to the consumer. Even if this were so, there is nothing unreasonable about it. If defendant dealt only with the retailers, all the retailers would naturally have to pay the same price. It is possible for defendant to do this, but

only at a greatly enhanced cost. Hence no retailer would obtain the goods any more cheaply than he does at the present time and no retailer would obtain them at any different price than every other retailer. Indeed, this course of conduct would be enforced upon the defendant by the provisions of Section 2 of the Clayton Act. There can hence be no vice in this.

Defendant can accomplish nothing with regard to the consumer's price under these agreements than it could not accomplish by direct dealing with the retailer; indeed than it would be forced to accomplish under the Clayton Act.

The Government also contends that some wholesalers have less expense than others and can sell cheaper; that the prices fixed by defendant necessarily involve a satisfactory profit to those who have the greatest expense, which results in the undue profit to those who have the least expense. This is a mere theory. The fact may be that the item of overhead runs very much the same and that amongst wholesalers generally there is a certain level of percentage of profit which is accepted as the normal profit.

The Clayton Act which was passed in order to secure fair dealing provides for a fixed price to all dealers in a given class (Section 2), and if all dealers in a given class receive the same price this would result in many instances of different profits by different dealers. If A's expense is half of B's, then A can make an exorbitant profit and still undersell B. If each pays $1.00 for his goods and A has a selling expense of $.25 and B a selling expense of $.50, it is quite obvious that A would sell the goods at less than B's total cost and still make a profit. Or if $.50 be denominated a fair profit, B could never sell goods in competition with A. Yet this is a direct result flowing from the provisions of Section 2 of the Clayton Act.

These are inevitable conditions in every trade and to cite what the Government cites as an argument in this particular case is of no force or effect.

We have elsewhere made reference to the Dr. Miles case and the Thomsen case, which cases are largely relied on by the Government.

The Government's position with regard to proper distribution by the fixing of prices set forth on page 14 of the Government's brief, involves a curious misapprehension of the principle.

No one asserts that large profits are to be justified by the importance of the article to the public. The true state of facts is that where wide distribution is of peculiar importance to the public, as in the case of repair or replacement parts or similar devices, it is reasonable and justifiable to assure such a reasonable profit as will *secure the wide distribution*. It is far more important to have the distribution than a possible slight reduction in prices, because of the loss in time, tires and safety which would result from the inability of the consumer to purchase supplies at practically any point on the road.

DEFENDANT'S CONTRACTS.

Defendant has two license contracts with its tire maker customers, Exhibits A and B, and two license contracts with its jobber customers, Exhibits C and D. The first tire maker's contract, A, and the first jobbers' contract, C, relate to tire valve and valve parts. The second contracts, Exhibits B and D, relate to the "patented devices."

These contracts are open to this Court for original examination where not interpreted by the District Court.

Exhibit A shows clearly from paragraph 1 that de-

fendant supplies the tire maker with quantities of valves to be made up in the tire makers' original product. This part of the contract is not complained of by the Government. Paragraph 4 of Exhibit A shows that the tire maker customarily distributes certain valves and valve parts for the purpose of replacement or repair to valves already attached to tires. These the tire maker mainly supplies to the jobber, and the jobber mainly supplies to the retailer. So far as valves and valve parts are concerned, the only complaint of the Government is against defendant's action in fixing the price of resale on such valves and valve parts as are required by the consumers for purposes of repair and replacement, a naturally small part of the defendant's business.

Defendant contends that the main object of fixing the prices on these repair and replacement parts is to get them in the hands of as many retailers as possible. By insuring the tire maker a reasonable profit, the tire maker is active in distributing to the jobbers. By securing the jobber a reasonable profit, the jobber is active in distributing to the retailers.

Just as soon as this wide distribution is secured, the defendant's object is accomplished. It does not fix the prices in the hands of the retailers; it does not go one step further than is necessary to secure the wide distribution desired.

If this wide distribution were principally in defendant's interest, it might be criticised. But it is predominately in the public interest, and just as soon as this public interest is served, defendant releases all control over the goods, namely, in the hands of the retailers.

It may be asked what predominating public interest there is in the wide distribution of such repair and replacement parts which is not also in the wide distribution of any other article. Answering this, we would say that we believe the Court can take judicial notice of the following facts:

Pneumatic tires are used on vehicles; they are inflated by air; there must be some device for inflating them; a tire valve is such a device; such tire valves are liable to injury and their parts are apt to become lost or mislaid; when a tire valve is injured or parts of it lost, it can no longer serve its function; when it does not serve its function, the tire is not kept inflated; it is practically impossible to run a vehicle provided with pneumatic tires unless the tires are inflated; to do so would endanger the expensive tire shoe or casing, and would introduce an element of danger in the operation of the vehicle; that such injuries to, or losses from the tire valve or parts thereof, customarily occur on the road; that for safety they must be repaired as quickly as possible; that in the interest of the consumer it is important that facilities for repair or replacement should be found at the point nearest to where the injury or loss occurs.

These facts of common knowledge being true, it follows inevitably that the greatest number of retailers should carry repair and replacement parts for defendant's valves.

While defendant obtains the benefit of the sale of these repair and replacement parts, it would obtain more benefit if a tire valve when once injured or was necessarily cast aside and a new one bought; the tire

maker also would obtain more benefit if when a tube or tire was rendered useless by injury to the valve, a new tire or tube must be bought.

With regard to the patented devices agreements B and D, the articles covered thereby are merely accessory to the valves. The quick acting dust cap is part of the valve. The tire valve repair tool is solely for the purpose of keeping the valve in running condition. The pump connection is an accessory to the valve to permit inflation. The gauge is used jointly with the valve to indicate the proper inflation. While the public interest in wide distribution is perhaps not so important in the case of these articles, nevertheless it is sufficient to make it an altogether reasonable thing to secure such distribution that the public is able in the case of loss or injury to obtain them at the nearest possible point, irrespective of whether this is a remote hamlet or a commercial center.

The Decision in United States v. Colgate.

On the face of the Sherman Anti-Trust Law every contract or combination which has any effect whatever to restrain trade falls within its provisions. As interpreted, however, if the conduct of the defendant is reasonable for the protection of its own business, and trade is not restrained unduly in view of all the circumstances, the act does not apply.

In the *Colgate* case (250 U. S., 300), the manufacturer effected a practical price fixing of his goods in the hands of his customers and could enforce these fixed prices by a refusal to deal with the customers if they did not adhere to them.

The indictment charged as a matter of fact that the dealers resold at uniform prices fixed by the defendant and refused to sell at lower prices, and that competition by the wholesale dealers in sales to the retail dealers and by retail dealers in sales to the consuming public was suppressed, or, as set forth in the opinion of the District Court, the charge was made that the conduct of Colgate "resulted in the enhancement and maintenance of such prices, and in the suppression of competition by wholesale dealers, and retail dealers, and by the latter to the consuming public."

The effect of the Court's decision in the Colgate case is, we think, necessarily, that it is a reasonable thing for such a manufacturer by such means to fix the resale prices of his commodities.

The question which then confronts us is: If it is a reasonable and legal thing for a manufacturer, under the circumstances of the Colgate case, to secure a fixation of resale prices and a suppression of competition between wholesalers and between retailers, would it be a crime under the Sherman Act to secure precisely this same effect by means of a written agreement?

It seems to us that the Colgate decision is a standard by which the acts of any defendant charged with price fixing can be measured, and that the Sherman Act should not be construed to make out a crime where the same result is secured, and the only difference is that the customer, instead of acquiescing in what the manufacturer wishes, merely says that he will acquiesce, in writing.

To put the matter in another way, it is a reasonable thing to do under the Sherman Act what a man has a perfect right to do under the general law.

This defendant has effected no result which Colgate did not effect. On the contrary, Colgate went away beyond

the effect produced, or even desired, by this defendant. Defendant's main purpose is to obtain a distribution of his goods. When they are in the hands of the retailers and widely distributed, defendant's interest ceases. The retailers may freely compete.

In the Colgate case the goods were in effect controlled by the manufacturer while in the hands of the retailers.

We are aware that there is a technical difference between goods which in theory may be freely sold by the dealer, and goods which in theory cannot be sold by the dealer except at a fixed price. But this distinction is merely a form of words when the actual facts are considered.

Colgate's dealers had the technical right to sell Colgate goods at any price they pleased. As a matter of fact, however, they could not sell them at any price they pleased without incurring the penalty of being able to get no more goods.

Colgate's intent and purpose was to fix resale prices. Both the indictment itself and the District Court in the case at bar stated that the effect of Colgate's act was the fixation of prices and the suppression of competition.

Colgate accomplished what he did by what may be termed commercial duress, but it was accomplished; and just as effectually as by any other means.

We wish to make perfectly clear this point. Is the Sherman Act to be interpreted so that it does not cover this effectual fixation of prices by one who has the intent and purpose of fixing prices and who proceeds to adopt means to secure this result, and at the same time interpreted to include one who has the same intent and purpose and who chooses the same means with the only difference that he secures the written agreement of the dealer to observe the fixed prices? Would this be a reasonable interpretation of

the act to thus make a man's liberty depend upon a shadow and leaving him scot-free to violate the substance of the law?

This was one of the considerations we believe that induced the District Court to dismiss the indictment. The District Court in the case at bar was forced to the position, as we take it, that there must be some distinction between the Colgate case and the Miles case. The District Court, as we understand it refused to adopt the theory that the mere technical and shadowy point of there being a written agreement was the controlling factor. That the substance of the Miles decision was that in the Miles case there arose a situation which had the inherent factors of a monopoly. That unless these factors of a monopolistic enterprise were present, price fixing contracts were reasonable under the Sherman Act.

In the Colgate case it was said:

> "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

There is nothing in the present indictment, or in the District Court's interpretation of it, which shows that defendant coerced any of its licensees into signing defendant's contract. The allegation is merely that defendant refused to deal with those who did not enter into such contracts and adhere to the uniform sale price fixed. But this is precisely what Colgate did. In the language

of the Colgate decision, defendant apparently had a perfect right to "announce in advance the circumstances under which he would refuse to sell."

Defendant used no methods except to offer to sell its goods to those who wished to sell them under defendant's conditions.

In the Miles case the price fixing contracts were so extended and so widespread as to include practically the entire trade, wholesale and retail. For *every violation* the retailer was held in liquidated damage of $25. There was no schedule of specific medicines, the contracts apparently binding the dealer as to any medicines which the Miles Co. might put out. We repeat that such a complete and perfected system has the elements of monopoly within it and would be so dangerous to the public welfare as to induce the Court to believe it was unreasonable under the Sherman Act, and hence illegal.

But that is not the present case. In the present case the defendant fixes its prices merely in the hands of those who can assist in distributing its goods as widely as possible to the ultimate seller, namely, the retailer. Hence, the vast body of the trade is not in any way connected with defendant and monopolization of the trade by any such methods would be impossible.

The judgment of the District Court should be affirmed.

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EARL A. DARR,
Of Counsel for Defendant-in-Error.

CONTENTS.

CASES CITED.

In the Supreme Court of the United States.

October Term, 1919.

No. 567.

The United States, plaintiff in error,

v.

A. Schrader's Son (Inc.), defendant in error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error under the Criminal Appeals Act of March 2, 1907 (C. 2564, 34 Stat. 1246), to review a judgment of the United States District Court for the Northern District of Ohio sustaining a demurrer to an indictment against A. Schrader's Son (Inc.), based on the Sherman Anti-Trust Act of July 2, 1890 (C. 647, 26 Stat. 209).

The indictment charges that the defendant is a New York corporation, engaged in that State in manufacturing, under letters patent, valves, pressure gauges and other accessories for use in connection

with pneumatic tires on automobiles and other vehicles; and in selling and shipping its products to tire manufacturers and jobbers throughout the United States, who in turn resell and reship them, in both intrastate and interstate commerce, to retail dealers and to the consuming public. (R. 1, 2.)

The indictment charges that the defendant engaged in a combination in restraint of the interstate trade in its products by executing contracts with the tire manufacturers and jobbers fixing their resale prices to retail dealers and to the consuming public. (R. 2.)

Thereupon, the indictment charges, the tire manufacturers and jobbers uniformly adhered to such resale prices, and thus competition amongst them was suppressed, and their prices to the retail dealers and to the consuming public were enhanced. (R. 2, 3.)

The District Court interpreted the indictment as follows:

> The substantive allegations of this indictment are that defendant is engaged in manufacturing valves, valve parts, pneumatic pressure gauges and various other accessories; that it sells and ships large quantities of such articles to tire manufacturers and jobbers in the northern district of Ohio and throughout the United States; that these tire manufacturers and jobbers resell and reship large quantities of these products to (a) jobbers and vehicle manufacturers, (b) retail dealers, and (c) to the public, both within and without the respective States into which the products

are shipped; that these acts have been committed within three years next preceding the presentation of this indictment and within this district; that the defendant executed, and caused all the said tire manufacturers and jobbers to whom it sold its said products to execute with it, uniform contracts concerning resales of such products; that every manufacturer and jobber was informed by the defendant and well knew when executing such contracts that identical contracts were being executed and adhered to by the other manufacturers and jobbers; that these contracts thus executed purported to contain a grant of a license from the defendant to resell its said products at prices fixed by it to (a) jobbers and vehicle manufacturers similarly licensed, (b) retail dealers, and (c) the consuming public; that all these contracts provided that the products thus sold to tire manufacturers and jobbers provided that they should not resell such products at prices other than those fixed by the defendant. Copies of these contracts are identified by exhibit numbers and attached to the indictment. It is further charged that the defendant furnished to the tire manufacturers and jobbers who entered into such contracts, lists of uniform prices, such as are shown in said exhibits, which the defendant fixed for the resale of its said products to (a) jobbers and vehicle manufacturers, (b) retail dealers, and (c) to the consuming public, respectively; and that the defendant uniformly refused to sell and ship its products to tire manufac-

turers and jobbers who did not enter into such contracts and adhere to the uniform resale prices fixed and listed by the defendant.

> Further, that tire manufacturers and jobbers in the northern district of Ohio and throughout the United States uniformly resold defendant's products at uniform prices fixed by defendant and uniformly refused to resell such products at lower prices whereby competition was suppressed and the prices of such products to retail dealers and the consuming public were maintained and enhanced.
>
> Such, as I understand them, are all of the substantive allegations of the indictment. (R. 30, 31.)

And again—

> I interpret it [the indictment] as charging that defendant has made contracts with all tire manufacturers and jobbers to whom it sells its product to execute uniform contracts, and that these contracts contain provisions requiring that they shall not sell to jobbers and vehicle manufacturers, retail dealers and the consuming public except at certain prices fixed by the defendant. (R. 40.)

The District Court stated its ground for sustaining the demurrer to the indictment thus (R. 40):

> The Sherman Anti-Trust Law, as I construe it, in the absence of other and additional allegations charging an intent and purpose to monopolize trade, does not make the acts thus charged a crime.

The United States assigned error (R. 42) in that—

> The trial court erred in sustaining the demurrer to the indictment, such decision and judgment being based on the construction of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

ARGUMENT.

I.

The defendant's patents have no bearing on this case.

On this point we merely refer this Court to the reasoned opinion of the District Court holding that the decisions of this Court establish that patented and unpatented articles are on the same footing with respect to fixing resale prices; that defendant's so-called "license agreements" were mere selling agreements; and that defendant's use of the term "royalties" was merely intended to give color to its untenable theory that the patents justified what was done. (R. 32, 33.)

II.

The indictment charges an offense under the decisions of this court.

The conclusive interpretation of the indictment (*United States* v. *Carter*, 231 U. S. 492, 493; *United States* v. *Miller*, 223 U. S. 599, 602) was, as shown above, that it charged a system of resale price-fixing contracts, between a manufacturer and wholesalers of its products, obligating the wholesalers to adhere

to uniform specified resale prices, eliminating competition between the wholesalers, enhancing their prices to retailers, and enhancing the prices paid by the consuming public.

In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, this Court vigorously denounced a system of resale price-fixing contracts between a manufacturer and dealers in its products, as against the *public* interest, upon the ground that it was as if the dealers had agreed amongst themselves, as condemned in the *Addyston* case, to fix prices and suppress competition. The Court declared (pp. 407, 408):

> Nor are we dealing with a single transaction conceivably unrelated to the public interest. The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them . . . The complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other . . . But agreements or combinations between dealers having for their sole purpose the destruction of competition and the fixing of prices are injurious to the public interest and void . . . *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271; 175 U. S. 211 . . . The complainant's plan falls within the principle which condemns con-

> tracts of this class. It in effect creates a combination for the prohibited purposes . . .

In *United States* v. *Colgate & Company*, 250 U. S. 300, the indictment was interpreted as charging that the company combined with the dealers to procure their adherence to resale prices fixed by the company, and secured their "assurances and promises which resulted in the enhancement and maintenance of such prices and in the suppression of competition." (250 U. S. 304.) In that case the company achieved the enumerated results by procuring adequate promises and assurances from the dealers, without employing *contracts* obligating the dealers not to resell except at the prices fixed by the company.

This Court held that the demurrer to the indictment should be sustained on the ground that (p. 307)—

> as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company—

and distinguished the *Dr. Miles* case with reference to that ground, saying (pp. 307, 308):

> In Dr. Miles Medical Company v. Park & Sons Company, supra, the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell.

In the present case the District Court refused to recognize that distinction, saying (R. 38):

> Personally and with all due respect, permit me to say that I can see no real difference upon the facts between the Dr. Miles Medical Company case and the Colgate Company case.

and denying (R. 38)—

> that the two cases are to be distinguished because in the former contracts had been entered into between the maker and the jobbers and retailers, whereas in the latter no such contracts had been entered into, but the maker merely fixed the wholesale and retail prices and procured an express or tacit agreement to observe them by certain methods less formal, but none the less essentially the same—

which "less formal" methods included amongst other things (R. 38; 250 U. S. 303)—

> requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; . . .

The District Court thus erred in holding of no essential importance the contractual obligations which distinguished the *Dr. Miles* case from the *Colgate* case; and which likewise distinguish the present case.

III.

The District Court erroneously construed Section 1 of the Sherman Act, which prohibits combinations in restraint of trade, as only applying where there is a violation of Section 2, which prohibits monopolization.

Having rejected, as shown above, the distinction established by this Court between the *Dr. Miles* case and the *Colgate* case, according to which the present indictment charges an offense, the District Court erred in attempting to establish a different distinction between the two cases, upon the basis of an untenable construction of the Sherman Act, according to which the present indictment was held not to charge an offense.

The District Court declared, after the statements previously quoted (R. 39, 40):

> Manifestly, therefore, the decision in the Dr. Miles Medical case must rest upon some other ground than the mere fact that there were agreements between the manufacturer and the wholesalers.
>
> That further ground, it seems to me, is pointed out in the Colgate case and in the quotations heretofore made from the Dr. Miles Medical Company case. There must be a purpose to create and maintain a monopoly, and the acts charged in the indictment must be sufficient to show that there was effective means adopted to create and maintain a monopoly, otherwise the right of the trader or manufacturer to specify resale prices and re-

fuse to deal with anyone who fails to maintain the same is of necessity destroyed.

In the Dr. Miles Medical Company case the allegations of the bill were interpreted as disclosing a purpose to create or maintain a monopoly and as describing conduct and acts adequate so to do. The particular allegations emphasized as adequate so to do were the contracts and the system of business imposed upon the retailers, regulating and controlling their relations to the ultimate consumer. . . . The point, however, which I wish to emphasize is that the allegations of this indictment not alleging any purpose, or facts from which such a purpose can be inferred, to monopolize interstate trade, within the prohibition and meaning of Section 2 of the Sherman Anti-Trust Act and the last clause of Section 2 of the Clayton Act, does not charge a crime under Section 1 of the Sherman Anti-Trust Act as that act should be construed.

Thus the District Court adopted the construction that a resale price-fixing combination is not condemned under Section 1 of the Sherman Act as being in restraint of trade, unless it is also condemned under Section 2 as a monopolization.

That construction is opposed to the declaration of this Court in *Standard Oil Co.* v. *United States*, 221 U. S. 1, that (p. 50)—

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is

> the subject with which the second section is concerned—

and that (p. 57)—

> Contracts or acts which it was considered had a monopolistic *tendency*, especially those which were thought to unduly diminish competition, and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. [*Italics ours.*]

Nor is it supported by the *Colgate* case, despite the suggestion of the District Court that it is so supported. In that case this Court mentioned the absence of a purpose to create or maintain a monopoly; but without intimating that there could be no unlawful restraint of trade falling short of such a purpose. (250 U. S. 307.) The demurrer to the indictment in that case was not sustained because of the absence of a charge of control over the resale prices of retailers; for control over the retailers' prices was charged to the same extent as over those of the wholesalers. (250 U. S. 304.)

Moreover, the construction adopted by the District Court is opposed to the *Dr. Miles* case, although the Court asserted that it was supported by that case. The decision in that case was *not* due to a finding of monopolization in that the entire trade from wholesalers to retailers *and* from retailers to consumers was controlled. It was due, as shown above, to the finding that there was a combination enhancing

prices and suppressing competition which was condemned as in restraint of trade—not as a monopolization—as being virtually a price-fixing agreement amongst competing dealers like that amongst competing manufacturers in the *Addyston* case, where only 30 per cent of the particular commodity was involved. (85 Fed. 279.)

If the statute is to be construed according to the *Dr. Miles* case as intended to prevent combinations tending to enhance prices paid by the public, the construction adopted by the District Court is untenable. For the tendency to enhance prices paid by the public not only exists in a combination, but is fulfilled, although no retailers are included in the combination, but only wholesalers; and the District Court so interpreted the present indictment. (Supra, 4.) The enhancement of the prices at which the wholesalers sell to the retailers is, of course, transmitted by the retailers to the public; and is ultimately borne by the public. It is analogous to the case of a price-fixing agreement between competing manufacturers, which is unlawful although the enhancement of prices is transmitted to the public through dealers not in the agreement with the manufacturers.

The District Court was mistaken in considering that the construction of the Sherman Act which it adopted was supported by Section 2 of the Clayton Act (38 Stat. 730), which makes it unlawful for any person engaged in interstate commerce—

> to discriminate in price between different purchasers of commodities, which commodities are

> sold for use, consumption or resale within the United States * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce * * * and provided further that nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

The District Court said of that enactment (R. 40):

> It is there made unlawful for any person engaged in interstate commerce or in the course of such commerce either directly or indirectly to discriminate in price between different purchasers of commodities. A proviso follows that nothing in that section contained shall prevent such persons from selecting their own customers in bona fide transactions and not in restraint of trade. The indictment here charges the selection of tire manufacturers and jobbers as the customers of the defendant company. If it has a right to select such customers in bona fide transactions and is forbidden from either directly or indirectly discriminating in price between them, what harm results if it puts such agreements in writing?

But Section 2 of the Clayton Act has no apparent bearing on *resale* price fixing. The District Court apparently overlooked that the enactment deals *only* with a person's selling prices to *his* customers, and in no way touches his fixing *their* prices to *their* customers, which alone is involved in this case.

That Congress does not intend the scope of the Anti-trust Act in preventing restraint of interstate trade to be diminished is apparent from its express declaration in the "Act to promote export trade and for other purposes" approved April 10, 1918, permitting combinations for promoting foreign commerce (40 Stat. 516, 517).

IV.

Resale price-fixing combinations are condemned because of their tendency to injure the public interest.

It is useless to argue that it was reasonable for the contracts to require the wholesalers to take profits ranging, according to the articles, from 19 to 50 per cent on resales to retailers, and from 50 to 150 per cent on resales to consumers (R. 24, 27), because it stimulated the wholesalers' sales, and thus procured a wide distribution of articles needed by the public.

Large profits can not be justified as reasonable because they encourage the distribution of articles needed by the public; for the principle of that justification would sanction taking advantage of the public necessity, e. g. for coal or food. However, the reasonableness, or unreasonableness, of resale prices does not determine the legal status of the combination which fixes them.

In the *Dr. Miles* case the combination was condemned, although the court had to assume that the prices fixed were reasonable, as was expressly pointed out. (220 U. S. 412.) The assumed reasonable-

ness of prices was irrelevant; for the combination was condemned on the same basis as an agreement between dealers fixing prices and destroying competition, and the court sweepingly declared as to *all* such agreements or combinations (220 U. S. 408):

> But agreements or combinations between dealers having for their sole purpose the destruction of competition and the fixing of prices are injurious to the public interest and void.

In full accord with that declaration is the holding of this Court in *Thomsen* v. *Cayser*, 243 U. S. 66. That was a suit under the Sherman Act for damages resulting from a combination of competing steamship companies establishing uniform freight rates. A judgment for plaintiff based on a holding that the combination was in violation of the statute *as a matter of law* (190 Fed. 536), although the particular restraint had been considered reasonable by the trial court (149 Fed. 934), was reversed by the Court of Appeals (190 Fed. 536). This Court reversed the Court of Appeals and affirmed the judgment for the plaintiff, saying (243 U. S. 84–86):

> . . . we are brought to the consideration of the grounds upon which the Circuit Court of Appeals changed its ruling, that is, that it was constrained to do so by the *Standard Oil* and *Tobacco* cases.
>
> . . . it is contended that it was decided in those cases that "the rule of reason" must be applied in every case "for the purpose of determining whether the subject before the court was within the statute" . . .

> . . . Counsel for defendants say that the *Standard Oil* and *Tobacco* cases . . . support what the history of the act establishes, that it was the "clear intent upon the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition or merely because they operate to raise the cost of commodities to consumers."
>
> The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce.
>
> We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants.

As stated in *Salt Company* v. *Guthrie*, 35 Ohio State 666, of price-fixing combinations:

> Courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public.

That has a special application to a combination fixing uniform resale prices for the products of a given manufacturer. For such uniform prices inevitably tend to be put *at least* high enough to yield a satisfactory rate of profit per article to dealers doing a small business at a high rate of cost. To require that rate of profit to be exacted by other

dealers who would be satisfied with less is injurious to the public by whom the higher prices are ultimately paid.

Moreover, all such combinations are injurious to the public interest in the extreme facility which they afford for arbitrarily advancing prices through the united action of the dealers in obedience to the will of the manufacturer. It is not a sufficient answer to refer to the dissenting opinion in the *Dr. Miles* case, and to repeat the suggestion that a manufacturer will be prevented from raising prices too high because the public will refuse to buy, or because of competition from articles of other manufacturers. The tendency of a resale price-fixing combination to enhance prices is injurious even though it may perhaps be counteracted ultimately by other influences if it goes too far; and as for competition from articles of other manufacturers, the prices of these too are higher if such combinations are permitted, than if they are done away with.

V.

Resale price-fixing combinations are not saved from condemnation by their advantages to the participants.

We may dismiss as wholly baseless the familiar contention that to condemn a resale price-fixing combination deprives the manufacturer of the advantage of exercising his undoubted right to suggest resale prices and to select as his customers those dealers who adhere to the suggested prices.

That undoubted right was referred to by this Court in the *Colgate* case. But that indictment was held

bad on the ground that it did not charge the existence of agreements obligating the dealers to adhere to the indicated resale prices. It was not held that the alleged securing of assurances and promises from the dealers to adhere to the indicated prices was a mere exercise of the right to suggest prices and select customers. It would be equally impossible to hold that the securing of contracts obligating the dealers to adhere to such prices is a mere exercise of that right. The manufacturer can, of course, suggest resale prices and select as his customers dealers who adhere to them, without restricting the dealers either by assurances and promises to so adhere, or by contracts obligating them to do so.

Another inadequate argument for resale price-fixing combinations is that they protect the manufacturer's legitimate interest in the good will of his products against a poor opinion of their value created by dealers selling them at ruinous prices as a bait to procure sales of other articles on which to recoup. Let us assume this practice to be harmful and dishonest, and that the manufacturer may legitimately withhold his goods from dealers addicted thereto. But, obviously, he may protect himself in that respect without creating a combination imposing absolute uniformity of price on all dealers, and thus preventing deviation from such price by efficient dealers who find smaller profits adequate and desire to content themselves with these in a manner that is fair, and honorable, and entirely beneficial to the public.

The real advantages of resale price-fixing combinations to the participants consist in the enhancement of prices which constitutes a disadvantage to the public. A liberal part of the enhanced price is distributed to the dealers in the combination in the form of profits consisting in the difference between their fixed buying prices and their fixed selling prices. This induces the dealers to promote the sales of the articles whose prices are so fixed rather than of other articles the prices of which are not fixed and are consequently kept down by competition amongst the dealers. A manufacturer is, of course, benefited when the dealers promote the sales of his products rather than of other products; and his profits are, of course, increased. But as for such considerations we merely note what this Court said in the *Dr. Miles* case (p. 408), after condemning resale price-fixing combinations as injurious to the public interest:

> They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.

CONCLUSION.

We submit that the order sustaining the demurrer to the indictment should be reversed.

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Specicl Assistant to the Attorney General.

JANUARY, 1920.

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